Nos. 87-1622, 87-1697, 87-1711
CONSOLIDATED

In The

Supreme Court of the United States

October Term, 1988

PHILIP BRENDALE,

Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,

Respondents.

STANLEY WILKINSON,

Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

COUNTY OF YAKIMA, *et al.*,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT, YAKIMA INDIAN NATION

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QUESTIONS PRESENTED

1. Does Yakima County threaten the political integrity or economic security of the Yakima Indian Nation by imposing land use and zoning regulation upon the non-member owned fee lands of the Yakima Indian Reservation even though the majority of the reservation lands are trust lands regulated by Yakima Nation and the tribal regulations and county regulations conflict?

2. Does the Yakima Indian Nation still possess those aspects of sovereignty not withdrawn by treaty, statute, or by implication as a necessary result of its dependent status?

3. Has the sovereign power of the Yakima Nation to provide land use and zoning regulation to non-member owned fee land on the Yakima Indian Reservation been withdrawn by treaty, statute or by implication as a result of its dependent status?

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STATEMENT OF THE CASE

A. ***Introduction***: The Confederated Tribes and Bands of the Yakima Indian Nation is an Indian nation which has maintained its sacred lands and traditions to the present time by virtue of the *Treaty With the Yakimas*, 12 Stat. 951. The governing body of the Yakima Nation continues to be recognized by the United States through the Secretary of the Interior – Bureau of Indian Affairs.

Through the *Treaty With the Yakimas*, the Yakima Nation, in 1855, ceded, relinquished and conveyed to the United States approximately 10,800,000 acres of land which had previously been dominated and occupied by the 14 tribes and bands making up the Yakima Nation. In the *Treaty With the Yakimas*, the Yakima Nation *reserved* from the large area of ceded land, for its *exclusive use and benefit*, approximately 1,300,000 acres of land which has come to be known as the Yakima Indian Reservation. [W. Ex. 1, p. 1] Governor Isaac Stevens was the primary treaty negotiator for the United States. In his efforts to convince the Yakima Nation to give up their lands (ceded area) and locate to a small portion of the lands they dominated (reservation area), Governor Stevens told the Yakimas:

> "It was found that when the white man and the red man lived together on the same ground, the white man got the advantages and the red man passed away." [W. Ex. 2, p. 19]

Consistent with Governor Stevens' statements, Article II of the *Treaty* [W. Ex. 1, p. 2] provides:

> "Nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon said reservation without permission of the tribe and the Superintendent and agent."

Less than 35 years after the United States and the Yakima Nation set forth their solemn agreement in the *Treaty With the Yakimas*, the United States Congress adopted an enabling act (25 Stat. 656, [W. Ex. 4]) in which the proposed states, including Washington:

> "do agree and declare that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by an Indian or Indian tribes; and . . . said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . .

Article XXVI of the Washington State Constitution of 1889 was adopted with language identical to that in the Enabling Act.

Notwithstanding the assurances of Governor Stevens, the unambiguous *Treaty* language, and the covenants with the state, the United States Congress unilaterally broke its agreements with various Indian tribes and opened fertile and valuable areas of various Indian reservations to the use and ownership by white men. While the Allotment Acts purported to "benefit" the Indian people and to assimilate them into a white man society, there is no doubt whatsoever that the primary motivation of Congress was to enable white people to gain ownership of the heart of most reservations. The Committee on Indian Affairs Report to the United States Senate in support of the legislation providing for the sale of surplus or unallotted lands of the Yakima Indian Reservation, [Act of December 21, 1904, 33 Stat. 595, reprinted in 3 Kappler 110 and 159 (1913)], demonstrates the greed of the non-Indians and the helplessness of the Yakima people to prevent the loss of their sacred lands. The report states:

> "*No agreement* has been made with these Indians, and *their consent has not been secured* for the opening of the reservation and the disposal of the unallotted lands. The failure to secure such consent or agreement, however, does not rest with the Government. Repeated attempts have been made to reach an agreement with these Indians and very liberal terms have been offered, but the Indians have declined to enter into such an agreement . . .

> This reservation is situated about 4 miles from North Yakima, a city with a population of about 7,000 people. It is located in the very heart of the irrigated district of Yakima County, and the state of Washington, and is *a very great hinderance* to the continued and complete development of that country. With so large a body of land as that held from settlement and cultivation, settlement and growth can not help but be retarded. We believe it to be very important that this reservation should be opened at once."[1]
> (Emphasis supplied.)

As soon as Congress opened the Yakima Indian Reservation to the non-Indian interests, a considerable amount of prime agricultural land passed from Indian to non-Indian ownership. The decay of the Yakima Indian Reservation continued for approximately 30 years, until the adoption of the Indian Reorganization Act. (25 U.S.C. Sec. 461 et seq.) Even though the Indian Reorganization Act halted the continued loss of most reservation lands, it did not specifically address the question of how the then present non-Indians and the then existing fee lands would fit into the revitalized concept that Indian people must govern themselves and their territory in order to maintain their economic, political and cultural identity. This continuing controversy, that is, the question of tribal regulation of non-Indians on various reservations, has been before in this Court in a variety of forms over the last century.

B. ***The Yakima Indian Reservation at Present***: The Yakima Indian Reservation still encompasses approximately 1.3 million acres. [For convenience, most reference support for factual matters will be to the Wilkinson petition (W.P.) and the appendix thereto.] Of the 1.3 million acres, *approximately 80 percent or 1.04 million acres is*

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[1] The full text of this report is printed at pages 1a-6a in the Brief for Mendocino County, et al, as Amici Curiae in support of Petitioners.

held in trust by the United States for the benefit of the Yakima Nation and/or its individual members. [W.P. p. 112a] The remaining 260,000 acres are held in fee by individual tribal members and by non-Indians. [W.P. p. 112a-113a]

In 1954, the Yakima Nation itself divided its reservation into two distinct areas for purposes of non-members' use and access. The Yakima Nation established a "closed" area of the reservation, permitting access only to Yakima Nation members and non-members receiving written permits. [W.P. p. 114a] The closed area consists of 807,000 acres, 740,000 of which are located in Yakima County. Of this 740,000 acres, 715,000 acres are held in trust by the United States and only 25,000 or 3.5 percent of the Yakima County closed area total, is held in fee. [W.P. p. 113a] A large majority of the fee land in the closed area is owned by a single timber company. [W.P. p. 128a and 129a]

The closed area of the reservation is predominately forest land; the remainder is non-irrigated range land. [W.P. p. 113a] Timber harvested in the closed area provides approximately 90 percent of the Yakima Nation's annual income. [W.P. p. 136a] The Yakima Nation has brought sophisticated game management and regulation to the closed area; as a result it abounds with game and wildlife. [W.P. p. 137a] The closed area also contains many places of cultural and religious significance to the membership of the Yakima Nation. [W.P. p. 136a] There are no permanent residents in the 740,000 acres of closed area in Yakima County.[2] Ingress and egress to the closed

[2] This was a finding of the District Court [W.P. p. 137a]. Petitioner Brendale has continued to make an effort to establish the existence of scattered structures in the "closed" area. The Yakima Nation disputes the validity of Petitioner Brendale's unsubstantiated remarks about such structures in the closed area.

area is monitored and controlled by four tribally-operated guard stations and by tribal police and tribal game officers patrolling the interior of the closed area. [W.P. p. 116a]

The remaining area of the Yakima Indian Reservation has, for the purposes of this case, been termed the "open" area. The open area consists of approximately 500,000 acres, 350,000 of which are located in Yakima County.[3] In Yakima County, approximately 175,000 acres, or 50 percent is trust land, and the remaining 175,000 acres, or 50 percent is fee land. [W.P. p. 40a and 83a] The total population of the open area is approximately 25,000, of whom 5,000 are tribal members. [W.P. p. 84a] The incorporated cities of Toppenish, Wapato and Harrah, with a combined population of approximately 10,000 are located on fee land in the open area. [W.P. p. 85a] White Swan is not an incorporated town nor does it lie within the closed area as stated by Petitioner Wilkinson. [See Map attached to Joint Appendix]

The open area of the Yakima Indian Reservation in Yakima County is predominantly agricultural. [W.P. p. 52a] Of the 143,000 irrigated acres in the open area, approximately 80,000 acres or 56 percent are held in trust status. [W. Tr. p. 422] The majority of the water to the irrigated lands in the open area is supplied by the federally constructed and maintained Wapato Indian Irrigation Project. [W. Tr. p. 416] Non-Indian water users on fee land

[3] The map attached to the Joint Appendix separates the open and closed areas in Yakima County. It does not identify the line between open and closed areas of the Reservation in Klickitat County and Lewis County.

are subject to regulation by the Wapato Project Manager, Portland Area office of the Bureau of Indian Affairs.

Contrary to petitioners' assertions, open area lands *do provide* considerable income to the Yakima Nation and its members. Approximately 67,466 acres of agricultural land in the open area is leased by the Yakima Nation and/or its members to non-Indians, resulting in the payment of more than $4,500,000 in annual land rentals.[4] This income is extremely important to the Yakima Nation economy. An additional 12,355 acres are farmed by tribal members, and also are very important to the Yakima Nation economy. The open area lands also are important to the Yakima Nation because of their religious and cultural significance. [W. Tr. p. 221-222] The importance of these open area lands to the Yakima Nation is clearly evidenced by the fact that the Yakima Nation has expended approximately 54 million dollars to regain ownership of deeded agricultural land in the open area of the reservation, land which had been lost to non-members during the Allotment era. [W. Tr. p. 119]

C. ***Tribal versus County Land Use Regulation***: These cases and the controversies which gave rise to their prosecution result from conflicting claims between Yakima County and the Yakima Nation as to which sovereign should provide land use and zoning regulation to that portion of the Yakima Indian Reservation located in Yakima County.

Comprehensive land use and zoning regulation is a relatively modern extension of a sovereign's police

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[4] Bureau of Indian Affairs' statistics on the Yakima Indian Reservation show an average annual cash rental of approximately $70.00 per acre for irrigated trust lands.

power. Prior to 1972, there were relatively few restrictions on land use within the Yakima Indian Reservation.[5] The zoning resolution of the Yakima Nation had only been in existence two years and was very basic compared to the comprehensive legislation now in place. In 1972, both the Yakima Nation and Yakima County adopted more comprehensive land use and zoning legislation. At the time, both ordinances were ultimately identical.

Yakima County's land use and zoning code regulates only fee lands outside the three incorporated cities resulting in the now familiar "checkerboard" regulatory scheme. This is in contrast with the Yakima Nation zoning code which provides uniform land use regulation for both trust and fee lands.[6] Yakima County has refined and updated its zoning codes applicable to fee lands on several occasions since 1972. The primary goal of the zoning codes of both the Yakima Nation and Yakima County in the open area remains the preservation of agricultural lands. [W. Tr. p. 35]

Petitioners argue to this Court that the Yakima Nation zoning code is defective because it has no subdivision provision. This simply is not accurate. Section 24 of the Yakima Nation Zoning Code clearly allows for subdivisions under the zoning term "planned development". [J.A. p. 65-76] A review of the planned development section of that zoning code establishes that

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[5] The temporary zoning resolution of 1946 and first zoning ordinance of 1965 by Yakima County did not provide comprehensive land use regulation as compared to more modern planning.

[6] As stated in Petitioners' briefs, the Yakima Nation has chosen to not assert zoning jurisdiction within the three incorporated cities in the open area.

subdivision schemes are permissible if the written requirements are met and the scheme is approved by tribal officials.

All petitioners boldly argue that Yakima County has provided "exclusive" land use regulation to the fee lands of the Yakima Indian Reservation for 35 years. Again, the evidence does not support this position. Keeping in mind that there exists approximately 175,000 acres of fee land and 20,000 non-Indians on the Yakima County portion of the reservation, the unchallenged statistics set forth by Yakima County and the other petitioners to support their position demonstrate the weakness of their argument. Yakima County states it has processed 148 short plats since 1965. [W. Tr. p. 457] This amounts to approximately eight short plats per year, not even one per month. Yakima County states it has processed 14 long plats since 1970. [W. Tr. p. 455] This amounts to only one long plat per year. Yakima County has issued 780 building permits since 1972. [W. Tr. p. 538] This breaks down to fewer than six per month. Insomuch as a building permit is required by modern governments on virtually every form of construction, this falls far short of "exclusive" County regulation on the reservation. In fact, in other litigation between Yakima County and the Yakima Nation, Yakima County has stipulated that during the past several years, only 6.4 percent of all matters worked on by the Yakima County Planning Department involve fee lands on the reservation.[7] It should also be noted that the Yakima Nation has processed 883 land use applications and 75

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[7] This is a fact to which Yakima County stipulated in *Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima, et al.*, No. C-87-654-AAM, appeal pending Dkt. No. 88-3929 in Ninth Circuit.

variances since 1972, *including 317 applications by non-members*[8]. None of the items on petitioner County's "list of horribles" has occurred as a result of the Yakima Nation's land use regulation of their fee lands. Finally, petitioner Brendale's assertion that Yakima County has provided exclusive land use regulation to fee land in the closed area of the reservation is totally unfounded. The Yakima County Planning Director admitted at the time of trial that Yakima County had *never* attempted to exercise land use jurisdiction within the closed area of the reservation prior to the consideration of the Brendale proposal. [B. Tr. p. 475 and 504] The facts demonstrate that Yakima County has *not* provided exclusive land use regulation to fee land in the "open" area of the reservation and has previously provided *no* land use regulation to the fee lands in the "closed" area of the reservation.

D. ***The Present Controversies***: The issues now being presented to this Court stem from two separate and distinct land use disputes concerning non-Indian owned fee lands within the Yakima Indian Reservation. The initial controversy involves petitioner Brendale. Mr. Brendale is the owner of 160 acres of fee land located deep within the closed area of the reservation. [W.P. p. 127a-128a] He did not purchase this land; he inherited it from his mother and grandfather who were both Yakima Nation members. [W.P. p. 123a-124a] Mr. Brendale's land never passed by "alienation" as that term is used in the Allotment Acts.

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[8] For purpose of clarity in the later arguments regarding petitioners' "bright line" zoning proposition, the term "non-member" has been used throughout. This use is not intended to invite the Court into a discussion of tribal jurisdiction over non-member Indians versus "non-Indians" in a context other than civil matters. That is a separate and complex issue which need not be reached in resolution of this case.

Mr. Brendale's land is forested and access to it is by unimproved road. No structures exist on Mr. Brendale's land and its saleable value to date stems from the occasional harvesting of timber. [W.P. p. 129a-130a]

Mr. Brendale's quarrel with the Yakima Nation has been ongoing since he inherited the land in 1972. Mr. Brendale refused to obtain the required entry permit from the Yakima Nation and a lawsuit had to be commenced in 1974 (*United States v. Brendale*, E.D. Wash. Civil No. 74-179) to compel his compliance with permit requirements. In 1978, the ongoing friction erupted into a second lawsuit (*Brendale v. Olney*, E.D. Wash. C-78-145) concerning access to the Brendale property by his heirs and assigns. In 1981, Mr. Brendale sought to benefit from the Yakima Nation's ongoing program to regain ownership of fee lands by offering his property for sale to the tribe. [B. Ex. 206] These negotiations were fruitless as Mr. Brendale sought an exorbitant sale price for his land as "development property" while the Yakima Nation offered a purchase price based on its value as timber land. Mr. Brendale has attempted to coerce the Yakima Nation into paying his price by proceeding with subdivision plans through Yakima County with the idea that, if the courts would grant land use jurisdiction to the county, the Yakima Nation would be compelled to pay his inflated price to protect against non-Indian development in the closed area. [B. Ex. 206, 207, 208 and 209]

Specifically, in April, 1983, Mr. Brendale filed an application with Yakima County to subdivide 20 acres of his property into ten two-acre lots. The proposed use for the two-acre lots was sites for recreational cabins and travel trailers. [B. Ex. 122] In spite of the challenge by the Yakima Nation, Yakima County determined that it had jurisdiction over the Brendale request.

The proposed Brendale development is prohibited by the tribal zoning code. [J.A. 38-76] In the "closed" area (also termed "reservation restricted area" by the tribal zoning code), the land use activities are restricted by the tribal code to the following:

1) Harvesting wild crops
2) Grazing, timber production or open field crops
3) Hunting or fishing by Tribal members
4) Camping in temporary structures
5) Tribal camps for the education and recreation of tribal members
6) Construction and occupancy of buildings and structures constructed by the Yakima Nation or the Bureau of Indian Affairs to be used in furtherance of tribal resources
7) No building or other permanent structure or any appurtenance thereto other than those allowed in Sections 1 - 6 above shall be allowed
8) Any structure which is authorized in Sections 1 - 6 above shall be set back 200 feet from any waterway

Under the County zoning code, Brendale's proposed development is permitted. The County zones Brendale's lands as well as most fee land in the closed area as "forest watershed". [B. Tr. p. 490] Other uses permitted by the County zoning code in "forest watershed" include, the construction and operation of bars, restaurants, taverns, motels, cafes and gas stations. [B. Tr. p. 520 and 521] It is obvious that in the "closed" area, the zoning scheme of the Yakima Nation and of Yakima County are not compatible.

The second land use dispute may be less striking, but is no less compelling to the interests of the Yakima Nation government. It involves fee land located in the open area of the Yakima Indian Reservation. Petitioner Wilkinson owns in fee approximately 100 acres of vacant sagebrush land located approximately one mile south of the reservation's northern boundary, [W. Tr. p. 519] and three miles

south of the city of Yakima. The land is located on the north side of Ahtanum Ridge, an area (as petitioner Wilkinson points out) geographically separated from the vast majority of the open area of the reservation. [W.P. p. 47a]

The Yakima Nation zoned Mr. Wilkinson's land as "Agricultural". [W.P. p. 42a] Yakima County zoned Mr. Wilkinson's land as "General Rural". [W.P. p. 44a] In 1983, Mr. Wilkinson obtained preliminary approval from Yakima County to subdivide 40 acres into 20 residential lots ranging in size from 1.1 to 4.5 acres. [W.P. p. 48a] Lot sizes of this nature are allowed in the county's "General Rural" areas. Mr. Wilkinson did not seek tribal approval of the proposed development. [W.P. p. 49a] Under the tribal zoning code, minimum lot sizes are five acres in "Agricultural" areas. [W.P. p. 42a] Mr. Wilkinson would need a variance or would need to proceed under the planned development section of the tribal zoning code in order to gain tribal approval of the proposed development. The Yakima Nation opposed the Wilkinson proposal and the County's assertion of exclusive jurisdiction to provide land use and zoning regulation for the Wilkinson property and other fee lands in the open area. It is the position of the Yakima Nation that Mr. Wilkinson and all other owners of fee land[9] in the open area should obtain tribal approval in land use and zoning matters.

E. ***The Decisions Below***: The Brendale (Whiteside I) matter was the first to be decided by the District Court. The Yakima Nation commenced the action in the United States District Court for the Eastern District of Washington in September, 1983, seeking to establish that Yakima

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[9] As stated hereinabove, the position of the Yakima Indian Nation only relates to fee lands outside the limits of the three incorporated towns.

County was without lawful authority or jurisdiction to make exclusive land use and zoning determinations as to all fee land within the "closed" area of the reservation including the fee land owned by Brendale. [J.A. p. 13-23] Trial of the matter occurred in February, 1984, before the Honorable Justin L. Quackenbush. The court determined that *Montana v. U.S.*, 450 U.S. 544 (1981) was controlling and at the conclusion of the trial, Judge Quackenbush determined that the efforts by petitioner Brendale and Yakima County to bring a development to the "closed" area of the reservation was an unmistakable threat to the political integrity, economic security and health and welfare of the Yakima Nation. The District Court keyed on several factors in finding that the Yakima Nation and not Yakima County had the authority to provide zoning and land use regulation as to the non-Indian fee lands in the "closed" area. [W.P. p. 127a-139a] They included:

1) The fact that the Yakima Nation has unquestioned authority to regulate land use and zoning for 96.5 percent (trust lands) of the closed area lands

2) The violent conflict between the uses permitted by the tribal and county zoning codes

3) The fact that 90 percent of all tribal income is generated from sales of timber harvested in the "closed" area

4) The demonstrated cultural and religious significance of the closed area of the reservation

5) The undeniable interruption to the wildlife and natural habitat of the presently uninhabited "closed" area, which could result from county zoning

6) The complete lack of any county interest in the closed area

In fact, Judge Quackenbush found as proven, 35 important facts which led to the conclusion that under *Montana*, the Yakima Nation, and not Yakima County, must provide land use and zoning regulation to the relatively small

area of fee lands in the "closed" area including that owned by petitioner Brendale.

After the Brendale (Whiteside I) matter was tried and an opinion issued, the Wilkinson (Whiteside II) matter went to trial in June, 1984, also before the Honorable Justin L. Quackenbush. As before, the court determined that *Montana v. U.S., supra,* was controlling. At the conclusion of the trial, Judge Quackenbush found the two cases to be different. Judge Quackenbush focused on the non-member and county interests which were present in the open area, but lacking in the closed area. [W.P. p. 51a-55a] The court compared the fact that in the closed area there are no non-member residents, but in the open area there are approximately 20,000 non-member residents. [W.P. p. 82a] The court compared the fact that in the closed area, fee lands constitute only 3.5 percent of the total lands, but in the open area, fee lands constitute approximately 50 percent of the total lands.[10] Overall, the reservation is approximately 80 percent trust land. [W.P. p. 82a-83a] The court compared the fact that in the closed area, Yakima County provided no governmental services, but in the open area, Yakima County provided a greater degree of governmental services. [W.P. p. 86a-87a] Finally, the court compared the fact that the County had exercised zoning jurisdiction on the fee lands of the open area for 35 years, and never in the closed area. [W.P. p. 85a-86a]

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[10] The fee land figures include the fee lands located within the three incorporated cities which are not at issue in these cases.

Judge Quackenbush then determined, as a threshold matter of law, that the Yakima Nation was without inherent sovereignty to provide land use and zoning regulation to the non-member owned fee lands of the open area. [W.P. 67a] Judge Quackenbush failed to balance the interests of the Yakima Nation against those of Yakima County. The Court failed to consider whether on-reservation zoning and land use regulation has any effect or bearing on the off-reservation interests of the County.

The Brendale (Whiteside I) and Wilkinson (Whiteside II) decisions both were appealed to the Ninth Circuit Court of Appeals.[11] The Ninth Circuit reviewed both cases and examined the issues under the tests of *Montana.* The Ninth Circuit had no trouble affirming the Brendale (Whiteside I) case. The court simply balanced the interests of the Yakima Nation against those of Yakima County and concluded that the County was precluded from zoning fee land within the closed area because the County's interest in imposing its regulation was clearly outweighed by the significant interests of the Yakima Nation. [W.P. p. 25a-29a] The Ninth Circuit then considered the question of which sovereign should regulate the zoning of fee land in the open area. Tne Court ruled that the District Court's threshold determination that the Yakima Nation had been stripped of its inherent authority to zone fee lands in the open area was an error of law. [W.P. p. 29a-31a] The Ninth Circuit correctly observed that the

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[11] *Yakima County chose not to appeal the Brendale decision regarding the closed area.* The County apparently was satisfied with Judge Quackenbush's decision giving the Yakima Nation's exclusive jurisdiction to provide zoning and land use regulation to the non-member fee land in the closed area. The County should not now be heard to argue that its zoning authority can be imposed in this area under a "bright line" test. (Brief of Yakima County at 33-36)

Yakima Nation derives its governmental authority not only implicitly from its status and a dependent sovereign, but explicitly from the *Treaty With the Yakimas*. [W.P. p. 17a] The Ninth Circuit applied this to the present status of the Yakima Indian Reservation stating:

> "Yakima Nation has exclusive authority to zone tribal trust land, which constitutes nearly all of the closed area and over half of the open area. Although the fee land owned by non-Indians is clustered primarily in one part of the reservation, the reservation still exhibits essentially a checker board pattern. If we were to deny Yakima Nation the right to regulate fee land owned by non-Indians, we would destroy their capacity to engage in comprehensive planning so fundamental to a zoning scheme. This we are unwilling to do." [W.P. p. 24a]

Because of this error of law, the Ninth Circuit reversed the District Court and remanded the matter with directions to balance of interests of Yakima County and the Yakima Nation and to weigh their competing interests keying on how county on-reservation zoning impacts or is connected with off-reservation interests. Because this Court has interceded by accepting certiorari, the question of which sovereign should provide ultimate land use and zoning authority to fee lands in the open area has not yet been resolved by either the District Court or the Ninth Circuit.

SUMMARY OF ARGUMENT

The Yakima Nation possesses all aspects of governmental sovereignty not withdrawn by treaty, statute, or by implication as a necessary result of its dependent status. Among these retained aspects of governmental sovereignty is the power to zone the reservation lands, as land use control is a fundamental aspect of local government.

The Yakima Nation argues that under *Montana v. United States*, 450 U.S. 544 (1981), the Yakima Nation has demonstrated that the claim of zoning authority by Yakima County as to non-member owned fee land within the Yakima Indian Reservation is a clear threat to the political integrity, economic security and health and welfare of the Yakima Nation. The County zoning code conflicts with the Tribal zoning code and interferes with the Tribe's authority over the trust lands which constitute the vast majority of the reservation.

The Yakima Nation then argues that *Montana v. United States, supra*, should not dictate the analysis of whether the Yakima Nation possesses the sovereign power to provide land use and zoning regulation to non-member owned fee land. The Yakima Nation contends that both previous and subsequent cases from this Court provide a consistently applied test, recognizing that Indian tribes have retained all aspects of sovereignty not withdrawn, as opposed to the *Montana* premise which provides that tribal power beyond what is necessary to protect tribal self-government is inconsistent with the dependent status of the tribes and cannot survive without express congressional delegation.

In employing the traditional sovereignty analysis, the Yakima Nation establishes that the power to zone non-member fee land has not been withdrawn by treaty or by statute, including the Allotment Acts and Pub. L. 280, and is not inconsistent with its dependent status.

Further, the Yakima Nation demonstrates that the zoning of non-member owned fee land is not an unconstitutional delegation of authority to the Yakima Nation by Congress. Restraints preventing the Yakima Nation from administering its zoning code in an unfair and discriminatory manner are obvious. Congress has the

plenary power to take this sovereign power away from the Yakima Nation if it so desires.

ARGUMENT

I. THE YAKIMA INDIAN NATION IS A TREATY SOVEREIGN WITH INHERENT POWER OF SELF-GOVERNMENT AND TERRITORIAL MANAGEMENT.

A. The Yakima Nation's Inherent Sovereign Powers are Derived Explicitly From the *Treaty With the Yakimas*, 12 Stat. 951.

On June 9, 1855, Governor Isaac Stevens, on behalf of the United States, entered into the *Treaty With the Yakimas*, 12 Stat. 951. This *Treaty* was ratified by the Senate on March 8, 1859, and signed by President Buchanan on April 18, 1859. In the *Treaty*, the Yakima Nation ceded, relinquished and *conveyed* to the United States over ten million acres of land owned by the Yakima Tribes. From this ceded area, the Yakima Nation *reserved* for its "exclusive use and benefit" a relatively small area of land which has become known as the Yakima Indian Reservation. Article II of the *Treaty* provides:

> "nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without the permission of the tribe and the superintendent and agent."

This Court has interpreted and explained the legal effect of similar treaty language. In *Williams v. Lee*, 358 U.S. 217, 221 (1958), the following guidance was given:

> "In return for [Indian] promises to keep peace, this treaty 'set apart' for their permanent home a portion of what has been their native country, and provided that no one – except United States personnel, was to enter the reserved area. Implicit in these treaty terms, as it was in the treaties with Cherokees involved in *Worcester v. Georgia*, was the understanding that the internal affairs of the Indians remained exclusively

> within the jurisdiction of whatever tribal government exists."

The *Treaty With the Yakimas* has been specifically construed by this Court. In *United States v. Winans*, 198 U.S. 371 (1905), this Court provided:

> "And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the rights, without regard to technical rules.' *Choctaw Nation v. United States*, 119 U.S. 1; *Jones v. Meehan*, 175 U.S. 1"

Winans at 380.

> "In other words, the Treaty was not a grant of rights to the Indians, but a *grant of rights from them*, – a reservation of those not granted."
> (Emphasis supplied.)

Winans at 381. See also *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974).

The concept that the Yakima Nation would govern themselves and their lands from which the white man would be excluded, was explained in explicit language at the Walla Walla Treaty grounds in 1855:

> " The Great Fathers name at that time was Andrew Jackson: he said I will take the red man across the great river into a fine country where I can take care of them; they have been there twenty years; *they have their government, they have their schools, they have their own laws*; their Cheif (sic) John Ross knows as much as my brother or myself and a great deal more; . . .
>
> Robert Johnson lives near John Ross *they both told me that what had been done for John Ross should be done for you, and more*, as I will tell you. . . .
>
> *I repeat again no white man could go there unless the red man consented to it.*
>
> *North of that tract of land the whites are going in but they cannot enter it; . . . that tract of land is the Indians*

home; his home and the home of his children." [W. Ex. 2 p. 19-20] (Emphasis supplied).

Kamiakin, the head chief of the Yakimas at the treaty responded:

> "I have something different to say than the others have said. It is young men who have spoken; I have been afraid of the white man, their doings are different from ours. Your cheifs (sic) are good, perhaps you have spoken straight, that your children will do what is right, *let them do as they have promised*. This is all I have to say." [W. Ex. 2 p. 49]

Obviously these "unlettered people" must have understood that they retained their government, that the reservation was theirs alone, and the white man could not enter without their consent.

The petitioners' contention that the Yakima Nation did not maintain and reserve in the *Treaty*, inherent power of self-government and territorial (reservation) management fails in light of this Court's previous interpretation thereof; the treaty itself, and the minutes of the treaty council. The Ninth Circuit was correct when it determined that the Yakima Nation derives authority "explicitly" from the *Treaty With the Yakimas*.[12]

B. The Inherent Sovereign Power of the Yakima Nation to be Self-Governing and to Provide Territorial Management has been Continuously Recognized by this Court.

History reports a vacillating federal policy toward Indian tribes and their reservation lands. A very brief review of this history is important to put the issues before this Court in perspective. From the time of the *Treaty* in 1855 to the time of the General Allotment (Dawes) Act of 1887, the federal policy was of treaty

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[12] The Ninth Circuit held that retention of Yakima Nation's inherent sovereignty was explicitly *recognized* and *reserved* by the treaty.

making and establishment of the federal control of Indian affairs. In 1887, a federal policy of allotment and assimilation was introduced. This policy continued to approximately 1930 when federal policy shifted to Indian reorganization and the strengthening of Indian governments. This policy lasted until World War II, a time when most young Indian men were at war and there was a high rate of employment of Indian people in war support programs. Federal policy moved back to a policy of termination and a partial abandonment of federal trust responsibilities to states. Several reservations were terminated and in 1953, Public Law 280 (67 Stat. 588) was adopted. The dismal failures of termination policies became evident and in 1961, the direction of federal policy returned to a strengthened concept of Indian self-determination and tribal economic development. This federal policy has continued uninterrupted to the present. (See Cohen's *Handbook of Federal Indian Law*, 1982 Edition, p. 47 to 204 for a detailed analysis of the history of federal Indian policy.)

In conjunction with the revolving federal policies toward Indians, all tribes, including the Yakima Nation must contend with the principle of *Lone Wolf v. Hitchcock*, 187 U.S. 299 (1903). In this case, this Court stated the concept that regardless of the many treaty contracts, Congress has plenary power over tribal relations and tribal lands, and that treaty language will fail against specific legislation which Congress has intended will abrogate Indian treaty rights. This combination of the principle of plenary power and vacillating congressional policy have left this Court and lower courts with a difficult task of sorting out the continuing viability of inconsistent congressional enactments and whether the repudiated legislation remains plenary to Indian treaty rights.

In spite of the backdrop of inconsistent federal policy, this Court has not wavered[13] from the concept that Indian tribes have inherent power of self-government and territorial management unless those powers have been abrogated by *specific* congressional legislation or are inconsistent with their dependent states. This line of authority begins with *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515 (1832). In *Worcester* at 560-561, Chief Justice Marshall explained:

> "The senate docketing of the law of nations is that a weaker power does not surrender its independence–its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, a ceasing to be a state."

The *Worcester* concepts were reaffirmed and followed by this Court in an unbroken line of subsequent cases including *The Kansas Indians*, 5 Wall 737 (1867); *Ex parte Crow Dog*, 109 U.S. 556 (1883); and *United States v. Kagama*, 118 U.S. 375 (1886).

The modern analysis of issues of self-government and territorial management begins with *Williams v. Lee, supra*. In *Williams*, this Court noted that no *specific* federal enactment had abrogated the powers of the Navajo Tribe to be self-governing, nor had Congress provided the state of Arizona with such jurisdiction over reservation Indians. This Court then set forth the landmark test against which issues of state and tribal jurisdictional conflicts are measured:

> "Essentially, absent governing Acts of Congress, the question has always been whether the state action

[13] But cf. *Montana v. United States*, 450 U.S. 544 (1981)

> infringed on the right of reservation Indians to make their own laws and be ruled by them."

Williams v. Lee, at 220.

The reborn recognition of the principles of *Worcester* has remained constant in cases subsequent to *Williams v. Lee, supra*. More importantly, subsequent to *Williams*, Congress has not enacted any legislation having a purpose of increasing state jurisdiction, thereby weakening tribal government. To the contrary, Congress has adopted numerous pieces of legislation which recognize the strengthen of tribal government and sovereignty.[14]

The cumulative impact of *Williams v. Lee, supra*, and modern congressional legislation aimed at strengthening tribal government was recognized in this Court in *United States v. Mazurie*, 419 U.S. 544 (1975), which involved the question of tribal regulation of on-reservation liquor sales by non-Indians on fee land. This Court stated:

> "Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over *both their members and their territory*, *Worcester v. Georgia*, 6 Pet. 515, 557, 8 L. Ed. 483 (1832); they are 'a separate people' possessing 'the power of regulating their internal social relations' . . . "
> (Emphasis supplied.)

United States v. Mazurie, at 557. Based in large part on this pronounced concept, this Court sustained the lawful authority of the Wind River Tribe to regulate liquor sales by non-Indians.

The *Mazurie* case was followed by the landmark cases of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and *United States v. Wheeler*, 435 U.S. 313 (1978). In

[14] See a listing of such legislation infra at page 44.

Wheeler, this Court set forth the definitive test for determining the extent of inherent tribal sovereignty providing:

> "The sovereignty that Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. *But until Congress acts, the tribes retain their existing sovereign powers.* In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a result of their dependant status."
> (Emphasis supplied.)

U.S. v. Wheeler, at 323.

The sovereignty pronouncements set forth in *Mazurie* and *Wheeler* have been used and repeated by this Court in many recent cases including, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1981); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 851 (1985); *California v. Cabazon Band of Mission Indians*, 480 U.S. ___, 94 L. Ed.2d 244 (1987); and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. ___, 94 L. Ed.2d 10 (1987). The common denominator of each of these cases, and this Court's resolution of the divergent issues which were reviewed, is that, in spite of the reputed allotment and termination legislation, Indian tribes have retained inherent sovereign powers over both their members and their territory, unless there exists *specific* legislation to the contrary or divestiture by implication.

II. THE SOVEREIGN AUTHORITY OF THE YAKIMA NATION TO REGULATE LAND USE WITHIN THE YAKIMA INDIAN RESERVATION IS CRITICAL TO THE POLITICAL INTEGRITY AND ECONOMIC SECURITY OF THE YAKIMA NATION.

A. The Yakima Nation Regulates Land Use and Zoning for All Trust Land Within the Yakima Indian Reservation.

It is a given that the Yakima Nation has exclusive authority to provide zoning and land use regulation to the trust lands of the Yakima Indian Reservation. During both the Brendale (Whiteside I) and Wilkinson (Whiteside II) trials at the district court level, all parties, including Yakima County, Wilkinson and Brendale, concede that the Yakima Nation has exclusive regulatory authority as to the trust lands in both the closed and open areas of the reservation. In fact, the Yakima County Planning Director testified that Yakima County Zoning Ordinance and the zoning maps exclude trust lands from any county zoning designations. [W. Tr. p. 527] This inherent tribal authority was recognized by the Ninth Circuit in its opinion below. The petitioners' concession to the regulatory authority of the Yakima Nation over the trust lands is consistent with *Worcester*, *Mazurie*, *Wheeler*, and the *New Mexico v. Mescalero Apache Tribe*, *supra*. See also 25 CFR Part 150 - 178 and Part 271.32 which sets forth federal guidelines for the regulation of trust lands.

B. The Yakima Nation Also Provides Land Use and Zoning Regulation for Tribal and Member Owned Fee Lands Outside the Incorporated Municipalities of the Reservation.

The Yakima Nation and many enrolled members of the Yakima Nation own fee lands outside the three incorporated cities located within both the closed and open areas of the Yakima Indian Reservation.[15] In addition to the petitioners' primary argument that the Yakima Nation is without authority to provide land use and zoning

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[15] The following legal argument assumes that the reader understands that the Yakima Nation has chosen not to provide zoning and land use regulation within the three incorporated cities. References to fee lands in the open area of the Reservation exclude the fee lands in said incorporated towns.

regulation to *non-member owned* fee land, there appears to be an issue concerning the regulatory authority of the Yakima Nation as to *tribal and member owned* fee land. Petitioner Yakima County urges this Court to establish a "bright line" test which would provide for state and county zoning jurisdiction over fee lands and tribal jurisdiction over trust lands. The Yakima Nation believes a discussion of this issue may be important to the resolution of the primary issue.

The suggestion of Yakima County is too simplistic and ignores important federal and tribal concerns. The *Treaty With the Yakimas* guaranteed to the Yakima Nation the exclusive right to make its own laws and govern its own membership and territory. See *Williams v. Lee, supra,* and *United States v. Winans, supra.* Zoning and land use regulation is a fundamental exercise of local government as it protects the health and welfare of its citizens. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926). The Yakima Nation has not been divested of this inherent authority when a member resides on fee land within the Yakima Indian Reservation. In *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463 (1976), this Court rejected the argument that state jurisdiction existed over tribal members residing on land which had been titled in fee under the General Allotment Act. The state of Montana had argued that it had general civil jurisdiction over tribal members on fee lands because of the language of Section 6 of the Allotment Act (25 U.S.C. 349) which reads in part as follows:

> "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside . . . "

This Court found Montana's argument to be "untenable", and that continued the efficacy of the General Allotment Act would substantially diminish the reservation's size. This Court concluded "such an impractical pattern of checkerboard jurisdiction" was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction. *Moe v. Salish & Kootenai Tribes,* at 478.

In *Moe,* this Court relied heavily upon the cases of *Seymour v. Superintendent,* 368 U.S. 351 (1962) and *Mattz v. Arnett,* 412 U.S. 481 (1973). In both of these cases, this Court considered the question of whether the General Allotment Act provided state jurisdiction over tribal members for activities conducted on fee lands lying within a federally recognized reservation. In *Seymour,* a member of the Colville Indian Tribe was charged in state court for a burglary committed on deeded land within the Colville Indian Reservation. This Court ruled that the state courts had no jurisdiction and that the offense was within the exclusive jurisdiction of the United States. This Court determined that the offense was committed in Indian country defined by 18 U.S.C. Sec. 1151 which reads in part as follows:

> "Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent,* and, including rights-of-way running through the reservation . . . "
> (Emphasis supplied.)

The *Seymour* analysis of 18 U.S.C. Sec. 1151 was repeated in *Mattz v. Arnett, supra.* This Court, in reversing the decisions of the California state courts, ruled that all lands, including the fee lands of the Klamath River Reservation were to be considered "Indian country" as defined by 18 U.S.C. Sec. 1151. This Court rejected the contention

that Section 6 of the Allotment Act (25 U.S.C. 349) continued as a grant of state jurisdiction over the allotted fee lands, noting that "the policy of allotment and sale of surplus land was *repudiated* in 1934 by the Indian Reorganization Act. *Mattz v. Arnett*, at 496 n.18.

Petitioners also cannot rely on Public Law 280 (67 Stat. 588) as authority for state and county zoning of Indian owned fee lands. This Court has specifically stated that Public Law 280 does not intrude upon inherent tribal regulatory authority, *California v. Cabazon Band of Mission Indians, supra.*

This Court has rejected the argument that the Allotment Act provides state jurisdiction over reservation Indians on reservation fee lands, Congress having "eschewed" any such "checkerboard" approach to such jurisdiction questions, *Moe* at 479.[16] Furthermore, as to the tribally owned fee lands of the reservation, Yakima County is without power to enforce its zoning ordinance.[17] Federal policy as construed by this Court has clearly established that only the Yakima Nation has the exclusive authority to bring zoning and land use regulation to tribal and member owned fee land in both the closed and open area of the Yakima Indian Reservation. Accordingly, the County's "bright line" test cannot meet the standards required by this Court.

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[16] See also footnote 14 in *Bryan v. Itasca County*, 426 U.S. 373, at 388, discussing this Court's recognition of the concept that the Court need not follow legislation not repealed, but clearly repudiated by later congressional action.

[17] The Yakima Nation enjoys sovereign immunity and believes that Yakima County could not compel the Tribe to comply with the County codes. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977)

C. County Zoning in the "Closed" Area is an Unmistakable Threat to the Political Integrity, Economic Security and Health and Welfare of the Yakima Nation.

The "closed" area consists of 807,000 acres, 740,000 acres of which are located in Yakima County. The remaining 67,000 acres are located in Klickitat and Lewis Counties. In the closed area of Yakima County, 715,000 of the 740,000 acres are held in trust by the United States for the Yakima Nation or individual tribal members. The majority of the fee land is owned by a single timber company. The closed area is predominantly forest land. The remainder is non-irrigated range land. The Yakima Nation derives approximately 90 percent of its annual income from timber harvested in the closed area. This income is used to fund tribal governmental operations. The closed area also contains many places of cultural and religious significance. The closed area supports wildlife and plant life which are a major source of food for tribal members. There are no permanent residents in the closed area of Yakima County. The Yakima Nation provides all law enforcement and game enforcement in the closed area.

In comparison, Yakima County provides no services in the closed area. The County has no roads in the closed area. The county provides no law enforcement or game management in the closed area. Petitioner Brendale's plat request which precipitated this case was the first effort by Yakima County to assume land use jurisdiction in the closed area. Petitioners Brendale and Yakima County ask this Court to rule that Yakima County should provide zoning and land use jurisdiction to the relatively minuscule area of fee land checkerboarded in the closed area. Uses which would be permitted in the closed area by the county are radically incompatible with the uses permitted by the tribal zoning code.

Montana sets forth the test against which the District Court and the Ninth Circuit measured these facts. In *Montana*, this Court provided:

> "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

Montana at 566.

Under this test, the Yakima Nation has established that the effort of Yakima County to bring zoning and land use jurisdiction to non-member owned fee land of the closed area is an overwhelming threat to the political integrity, economic security, and health and welfare of the Yakima Nation. The County Prosecuting Attorney summed up the position of the Yakima Nation best when he was discussing the closed area in argument to the District Court in Whiteside II. Mr. Sullivan stated:

> "Okay. But I agree this is a totally different area with a different interest. I think your Honor's question in the first case [Whiteside I] to me and Commissioner Tollefson were totally appropriate – what do you do out there? Nothing in the Closed Area. *We couldn't present any testimony about the services we provide; they don't exist. The real interest out there [in the Closed Area] does belong to the Yakima Indian Nation; we agree.*" [W. Tr. p. 372]
> (Emphasis supplied.)

Zoning regulation is a fundamental exercise of local government because it is designed to protect and promote the health and welfare of its citizens. *Village of Euclid v. Ambler Realty Co., supra.* This Court should not deprive the Yakima Indian Nation of its land use and zoning jurisdiction over non-member fee land in the closed area. To do such would open land use and zoning decisions in the closed area to four jurisdictions, Yakima County, Klickitat County, Lewis County, and the Yakima Nation.

Such chaos would undoubtedly destroy the Yakima Nation's ability to control the land use of its forest lands and to effectively manage the many natural resources of the closed area. This would undoubtedly be a detriment to the health and welfare of tribal members. Under the tests of *Mazurie/Wheeler*, and under the *Montana* test, the Yakima Nation must prevail in the closed area.

D. The Determination of Which Sovereign has Ultimate Authority to Zone Non-Member Fee Lands in the Open Area Remains to be Resolved.

The open area of the Yakima Indian Reservation presents circumstances for a *Montana* analysis different than those found in the closed area. Yakima County and the Yakima Nation both have asserted jurisdictional authority over non-member owned fee land for many years. As is the circumstance in the closed area, the Yakima Nation has unquestioned authority to regulate the land use and zoning for the trust lands in the open area. Considering that the incorporated cities and towns are not part of the dispute, the trust lands constitute more than 50 percent of the open area of the reservation. The fee lands are scattered among the trust lands in true checkerboard fashion. The map in the joint appendix demonstrates that no portion of the open area is predominately fee lands. It is not possible to foreclose the Yakima Nation's voice in the land use and zoning of the non-member fee lands without adversely affecting its abilities to regulate the trust lands.

As stated previously, the Yakima Nation, and particularly its members, derive a significant income from the lease of the irrigated trust lands. The open area also contains religious and cultural sites and many Indian cemeteries. [W. Tr. p. 213-220] Yakima County identified several *on-reservation* interests in an effort to substantiate its claim of zoning authority over non-member owned fee

land. These interests included the non-Indian population, county roads, law enforcement activities, and public schools. Yakima County did not identify a single off-reservation interest to support its claim of authority to zone the non-member owned fee lands of the reservation.

The District Court made a threshold determination of law that the Yakima Nation was without authority to exercise zoning jurisdiction over the non-member owned fee land. The Ninth Circuit disagreed with this conclusion of law. This Court should affirm the holding of the Ninth Circuit on this issue. The Ninth Circuit began with the basic premise that the power to zone is fundamental to a local government in order to protect the health and welfare of its citizens, citing *Village of Euclid v. Amber Realty Co., supra*. The Ninth Circuit was also very concerned about the effectiveness of two jurisdictions providing "checkerboard" zoning authority. Because zoning and land use are such a basic function of local government, the Ninth Circuit ruled the Yakima Nation has inherent authority to zone non-Indian fee land throughout the reservation, and remanded the case back to the District Court to balance the interests of the Yakima Nation against those of Yakima County in the open area to determine which sovereign should provide ultimate authority for the zoning of non-member fee land using the *Montana* test.

In argument to this Court, each of the petitioners and most of their amici have seized upon the unprecedented divesture statement in *Montana*, wherein this Court provided, "exercise of tribal government beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana* at 564. As argued

hereinbelow, this concept is difficult to reconcile with both previous and subsequent decisions of this Court. However, *Montana* then gave back most of what it took away from inherent tribal sovereignty by providing the above-quoted second exception, stating that tribes may retain inherent power of civil authority over non-members on fee lands when the political integrity, economic security, or health or welfare of the tribe is threatened.

Petitioners argue that this exception must be viewed narrowly. The Yakima Nation argues that if the divesture statement survives this Court's analysis in this case, then this second exception must be read broadly in order to mesh with the subsequent opinions of this Court in *Cabazon, National Farmers,* and *Iowa Mutual*. To read this second exception broadly will not necessarily produce the catastrophic results predicted by Yakima County.[18] It does not grant "virtually unlimited police power jurisdiction over the conduct of non-members on fee lands." *Oliphant,* is law and, therefore, any exercise of police

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[18] Clearly the Attorney General for the state of Oregon did not contemplate any such problems in giving his opinion, post-*Montana*, that the Umatilla tribe of Oregon had exclusive zoning authority over fee lands within its reservation. *Opinion of the Attorney General of Oregon, February 10, 1983, No. 8138.* The Umatilla Reservation, at the time of this opinion, was less than 40 percent trust land, in contrast to Yakima Reservation which is nearly 80 percent trust. The Umatilla treaty (12 Stat. 954) was concluded at the Walla Walla treaty grounds on *June 9, 1855*, the same day, same place and with the same negotiators who dealt with the Yakima treaty. Further, in response to the constitutional rights issue discussed by petitioner Brendale, the Oregon Attorney General concluded:

Question Two:

> "Will the constitutional rights of non-Indians who either reside in the area or own property in the area be represented in developing such a land use code?"

Answer: No.

power by the tribe over non-members must be reasonably enforceable through civil proceedings. Yakima County also assumes that the Ninth Circuit opinion invalidates state legislation on non-member fee land including Plats, Subdivisions, Dedications, RCW 58.17; Shoreline Management Act, RCW 90.58; and the State Environmental Policy Act, RCW 43.21C. Again, this argument distorts the Ninth Circuit opinion. The Ninth Circuit properly stated that a state's regulatory interest will be particularly substantial if the state can point to off-reservation effects (as could be done for these legislative enactments). Whether or not these statewide enactments are effective as to non-member owned fee land on the reservation is not before this Court.[19]

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[19] While the issue of other statutes' applicability is not before the court, petitioner's have raised the specter of invalidation of numerous acts which they claim presently apply at least to fee patent reservation lands. They cite the Shorelines Management Act, RCW 90.58 as one of these examples. It is interesting to note, however, that the Washington State Department of Ecology, the agency charged with administration of that act, has specifically excluded water and lands "within the Yakima Indian Reservation" (Ahtanum Creek, which forms the north boundary of the reservation and which flows through numerous fee patent lands on the reservation), and "all federal lands and Yakima Indian Reservation" (Yakima River which forms the east and a portion of the south boundary and which also flows through fee patent lands on the reservation).

Further, those state regulations are silent on Toppenish and Satus Creeks (totally on-reservation streams, which flow through and border many fee patent lands), both of which are otherwise eligible for inclusion under RCW 90.58. At least, for purposes of the Shorelines Management Act, it is clear that the state administrative agency with jurisdiction has recognized that the act does not have the applicability cited by petitioners.

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This case is factually dissimilar from the setting in *Montana*. The Yakima Nation has not accommodated itself to near exclusive regulation of land use and zoning of non-member fee land. However, the similarity between the county and tribal zoning codes in the open area did suppress for a time the inevitable conflict between the two sovereignties. This case is more akin to the circumstances in *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982) *cert. denied*, 459 U.S. 977 (1982), *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) *cert. denied*, 454 U.S. 1092 (1981) and *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1982) *cert. denied*, 459 U.S. 967 (1982). In each of these post-*Montana* cases, this Court refused to review lower court decisions which had balanced tribal interests favorably against state interests and thereby provided for tribal civil regulatory authority over non-members on fee lands.[20] If the *Montana* principal and two exceptions are to be the cornerstone of issues of inherent authority of tribes over non-members, this Court should affirm the remand of this case back to the District Court to balance the competing interests.

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The Court should refer to the map filed with the joint appendix for the location of Toppenish and Satus Creeks. The applicable regulations are attached hereto as Appendix "A".

[20] Petitioner County, by footnote raises the case of *Holly v. Totus*, ___ F.2d ___, 9th Cir. No. 85-4436 (9th Cir.), cert. denied 98 L.Ed.2d 47 (1987), as a case of "particular relevance," citing a potential conflict between water and land control on the Yakima Reservation. While *Holly, supra*, raises a potential for such conflict with regard to waters in excess of the total Yakima Treaty secured needs, the holding clearly recognizes by implication the authority of the Yakima Nation to assure that its full treaty needs are met before non-Indians may secure water. Implicit in the holding is the Yakima Nation's authority

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III. THE YAKIMA NATION BELIEVES THE *MONTANA* CASE SETS FORTH AN UNPRECEDENTED DEPARTURE FROM BOTH PRE-*MONTANA* AND POST-*MONTANA* DECISIONS AND SHOULD NOT BE CONTROLLING TO THIS CASE.

A. The *Mazurie-Wheeler-Colville* Line of Cases Provide a Better Reasoned Test of Tribal Sovereignty.

The Yakima Nation and all other Indian tribes are vitally concerned as to which aspects of retained inherent sovereignty this Court now recognizes. This Court established generally accepted concepts for tribally retained sovereignty in several cases before *Montana*. The *Montana* case then departed from previous decisions of this Court. This confusion was then compounded by opinions of this Court subsequent to *Montana*.

One of the key cases in which this Court has set forth guiding principles of inherent sovereignty is *United States v. Wheeler, supra*. Even though the issue for resolution in *Wheeler* centered around a tribal member, this Court provided significant statements about the extent of tribal jurisdiction over non-members. The *Wheeler* case, 435 U.S. at 323, provided what the Yakima Nation believes is the key test and the starting point for resolution of this issue and which bears repeating:

> "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of the dependent status."

This concept has been followed in post-*Montana* cases including *Iowa Mutual Ins. Co. v. LaPlante, supra*, and *Merrion v. Jicarilla Apache Tribe, supra*. Using this basic

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to regulate water use on fee lands to insure that such use does not prevent the Yakimas from receiving their full treaty share. Only after that regulation has occurred may the state make any attempt at regulatory authority.

premise, the Yakima Nation believes the true issue of this case should be stated: Has the sovereign power of the Yakima Nation to provide land use and zoning authority to non-member owned fee lands on its reservation been withdrawn by treaty, statute or by implication as a result of the Yakima Nation's dependent status?

B. The *Treaty With the Yakimas* Did Not Withdraw this Power.

United States v. Winans, supra, has laid to rest any argument that the *Treaty With the Yakimas*, can serve as the basis to conclude the Yakima Nation does not have such sovereign power. The *Treaty With the Yakimas* was not a grant of rights to the Indians, but was a grant of rights from them. In 1855, Governor Stevens did not discuss with the Yakima Nation that in the short span of 40 years, the Great White Fathers, (Congress) would allow the reservation lands to be parcelled and sold to non-Indians. Governor Stevens promised exactly the contrary. In the *Treaty With the Yakimas*, the Yakima Nation did not grant or give up its sovereign right to include reservation lands owned by non-Indians in any comprehensive tribal regulatory scheme.[21]

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[21] In *Montana*, this Court carefully considered the 1861 and 1868 Crow treaties, determining that in the establishment of the Crow Reservation the United States did not *convey* to the Crow tribe the Big Horn Riverbed. In its decision in *Montana*, describing the establishment of the Crow Reservation, the Court described the actions of the United States as "giving" and "conveying" the Reservation to the Crow tribe. The Court constructed this language and its effect on the Crow claim of exclusive jurisdiction with the Choctaw treaty in which this Court held that the Choctaw did indeed own the bed of a navigable river on its reservation. *Montana*, at 555, footnote 5.

This Court made clear that different treaties reserved different rights. The Court must make the same distinction in this

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C. There Is No Withdrawal or Divesture of the Yakima Nation's Inherent Power to Zone Non-Member Fee Lands by Implication.

We next consider whether this aspect of sovereignty has been lost or withdrawn by implication as a result of the Tribe's dependent status. In *United States v. Wheeler*, at 326, this Court followed the above-cited sovereignty test with a discussion of those sovereignty aspects which have been lost by implication.

> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those

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(Continued from previous page)

case. The Crow treaty makes no mention of either specific cession of lands it owned prior to the treaty, nor does it contain clear language of reservation of all lands and authority not ceded.

In contrast, Article I of the Yakima treaty provides:

> "The aforesaid confederated tribes and bands of Indians hereby *cede, relinquish and convey to the United States all their right, title and interest in and to the lands occupied and claimed by them*, . . .

Article II, which defined the reservation provides:

> "There is, however, *reserved from the lands above ceded* for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to-wit:
>
> (description omitted)."

It is clear that the Yakima treaty, as contrasted with Crow reserved lands *owned* by the Yakima Tribe and which had never become lands or territories of the United States. Under the Crow treaty, the Court could find that under the United States *conveyance* to the Crow Tribe that Crow had retained no authority over lands it did not own at the time of the treaty. Conversely, under the Yakima treaty, this Court must find that the Yakimas reserved unto themselves, by specific treaty language, all of their inherent sovereignty. This Court should distinguish the application of *Montana* to the Yakima Reservation.

> involving an Indian tribe and non-members of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy . . . They cannot enter into direct commercial or governmental relations with foreign nations . . . And, as we have recently held, they cannot try non-members in tribal courts." (Citations omitted.)

The *Montana* opinion, as well as petitioners and their supporting amici, takes the first sentence of this *Wheeler* quote out of context. The Yakima Nation submits that this statement must be read in its entirety to be correctly understood. To date, this Court has identified only three areas where tribes have been divested of sovereign powers by implication. This case does not involve a question of Indian efforts to alienate their land, nor does it involve a contract with a foreign nation. Furthermore, this case does not relate to the third circumstance, the trying of non-members in tribal courts. *Oliphant v. Suquamish Indian Tribe, supra*, ruled that Indian tribes have lost *by implication* the power to charge non-members with crimes, guilt or innocence to which are determined in tribal court. Contrary to the arguments of petitioners, *Oliphant* is narrowly limited to a discussion of the criminal jurisdiction of tribes over non-members. *Oliphant* carefully details why Indian tribes have lost by implication the sovereign power to try non-members in criminal proceedings. However, *Oliphant* did not depart from the *Worcester/Mazurie* principles of tribal sovereignty. The subsequent *Wheeler* opinion undoubtedly puts the *Oliphant* decision in perspective, recognizing that the *Oliphant* ruling fits clearly within one of the recognized exceptions to overall tribal sovereignty. The Yakima Nation has not made non-member violations of the tribal zoning code a crime or criminal act. The Yakima Nation has provided for enforcement of the zoning code by way of civil proceeding. As such, the *Oliphant* logic is not applicable to this case.

If *Wheeler* had been the final piece to this puzzle, the issue would be easy to resolve. However, this Court has followed *Oliphant* and *Wheeler* with *Washington v. Colville Tribes*, 447 U.S. 134 (1980), which in turn was followed by an unprecedented departure from the *Mazurie-Wheeler* rationale in *Montana v. United States, supra.*

In *Colville*, this Court stated that "tribal powers *are not implicitly divested* by virtue of their dependent status." That divesture is found "in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government. *Colville* at 153. This expression is not inconsistent with the *Wheeler* test and reflects a restatement of the divesture by implication test. However, nine months later in *Montana*, without mention of the decision in *Colville*, this Court held:

> "exercise of tribal power beyond what is necessary to protect tribal self-government is inconsistent with the dependent status of the tribes, and cannot survive without express congressional delegation."

Montana at 564.

The Yakima Nation disagrees with the implications of this statement. Four cases were cited to support this premise. The Yakima Nation is not willing to accept these four cases as authority for this Court's pronouncement. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) concerned an off-reservation ski resort owned by the tribe and the state's effort to collect a gross receipts tax. The majority opinion[22] in *Mescalero* ruled that New Mexico could lawfully impose its tax upon the off-reservation tribal enterprise. The argument centered over the impact of the

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[22] The Yakima Nation finds it interesting that the dissent from the majority opinion in *Mescalero*, 411 U.S. 145, 159-163, would have invalidated New Mexico's tax as having been preempted by federal law, a result totally inconsistent with the opinion in *Montana*.

Indian Reorganization Act of 1934, and whether fee lands acquired outside the reservation under the provisions of this federal legislation were cloaked with a tax immunity under a pre-emption analysis. This Court provided in *Mescalero* at 148, that "conceptual clarity of Chief Justice Marshall's view in *Worcester v. Georgia* (citation omitted) has given way to a more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of states, Indians and the Federal Government", and sustained the validity of the state tax as not preempted. However, *Mescalero v. Jones, supra*, was not a case involving on reservation sovereignty powers.

A review of the other three cases, *Williams v. Lee, supra*, at 214-220; *United States v. Kagama, supra* at 381-382; and *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 171 (1973) also results in an inability to find support for the *Montana* premise. The Yakima Nation can find no language limiting the existence of inherent tribal powers in these cases. Each of these four cases was a balancing of state versus tribal-federal interests to determine the lawfulness of the application of state law and/or jurisdiction. This is an issue fundamentally different from issues concerning the extent of inherent tribal powers. Prior to *Montana*, Indian tribes were possessed with aspects of sovereignty *not withdrawn* by treaty, statute or dependent status. In *Montana*, Indian tribes have no aspects of sovereignty beyond what was necessary to protect tribal self-government unless there existed *a delegation or grant* of such sovereignty by Congress. This departure from the *Wheeler-Colville* line of authority was not necessary to obtain the *Montana* result. In *Montana*, this Court departed from 150 years of precedent by reversing the

starting point for tribal sovereignty determinations. *Montana* was not a response to congressional legislation, nor was it supported by the federal government. To the contrary, all congressional legislation during the 1970's was directed toward a strong and expansive tribal government. This Court should clarify the often cited statement made in *Montana* and reaffirm the line of the cases from *Worcester* to *Mazurie* and *Wheeler*, a logic that recognizes that most Indian treaties are grants of rights from the tribes to the United States, not grants and powers to the tribes and that Indian tribes possess all aspects of sovereignty not withdrawn.

The Yakima Nation believes this Court's decisions in cases subsequent to *Montana* support the argument that *Montana* should be treated as a momentary or distinguishable divergence from recognized law. See *New Mexico v. Mescalero Apache Tribe*, *supra* at 332; *National Farmers Union Ins. Co. v. Crow*, *supra* at 851; *California v. Cabazon Band of Mission Indians*, 94 L. Ed.2d at 253 and 259; and *Iowa Mutual Ins. Co. v. LaPlante*, 94 L. Ed.2d at 18, 19 and 21, in which this Court stated:

> "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana v. United States*, 450 U.S. 544 565-566 (1981); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-153 (1980); *Fisher v. District Court*, 424 U.S. at 387-389. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the federal government. The proper inference from silence . . . is that the sovereign power . . . remains intact. *Merrion v. Jicarrilla Apache Tribe*, 455 U.S. at 149 n.14."

Unlike the issue of criminal jurisdiction discussed in *Oliphant*, there is no history of a federal assumption that Indian tribes lack such authority. No legislation has been passed by Congress which assumes tribes lack such authority. To the contrary, it can be argued that the Executive branch of the Federal Government has understood that an Indian tribe's authority to regulate fundamental government matters within the entire reservation continue notwithstanding the issuance of fee patents to non-Indians. See Opinions of the Solicitor, Dept. of Interior, Vol. 1, 55 I.D. 14 (October 25, 1934). Under the rationale of the recent cases and *Worcester*, *Williams v. Lee*, *Mazurie*, *Wheeler*, and even *Oliphant*, and under the *Iowa Mutual* interpretation of *Montana* there has been no withdrawal or divesture of the Yakima Nation's sovereign power to provide land use and zoning regulation to non-member owned fee land because of its dependent status,[23] and this Court should uphold this position.

D. The Sovereign Power of the Yakima Nation to Zone Non-Member Fee Land Has Not Been Divested or Abrogated by Statute.

The last inquiry under the *Wheeler* test is whether a statute adopted by Congress has divested or abrogated the tribal authority. Congress has plenary power over tribal relations and tribal lands. *Lone Wolf v. Hitchcock*, *supra*. Congress has the power to bar the exercise of civil jurisdiction by tribes over non-members. The question is whether any such congressional legislation is presently in force.

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[23] If the *Iowa Mutual* interpretation of *Montana* is not the correct test for determination of sovereign powers of Indian tribes which they retain, then the Yakima Nation relies on the record before this Court which establishes that the political integrity and economic security has been threatened by the County's actions which argument is set forth in detail hereinabove.

Petitioners and their amici argue that the sovereign authority of the Yakima Nation to zone non-member owned fee lands was divested by the General Allotment Act. The petitioners contend that the Allotment legislation remains in force insomuch as it has not been specifically repealed. This position fails to properly consider 55 years of subsequent congressional legislation and policy. The policy of allotment was *repudiated* in 1934 by the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. Sec. 461 et seq. The federal repudiation of the allotment debacle has continued subsequent to 1934 as evidenced by the definition of Indian country in 18 U.S.C. Sec. 1151, the Indian Self-Determination and Education Assistance Act of 1974, P.L. 93-638, 88 Stat. 2203, 25 U.S.C. 450 et seq.; Indian Financing Act of 1974, P.L. 93-262, 88 Stat. 77, 25 U.S.C. 1451 et seq.; and Indian Land Consolidation Act of 1983, P.L. 96-459, 96 Stat. 2517, as amended by Act of October 30, 1984, P.L. 98-608, 98 Stat. 3171, 25 U.S.C. Sec. 2201 et seq. Other recent legislation by Congress encouraging the exercise of reservation wide regulatory powers by tribal government include portions of the Federal Insecticide, Fungicide and Rodenticide Act, 92 Stat. 834, 7 U.S.C. Sec. 136(u); The Clean Air Act, 91 Stat. 1402, 42 U.S.C. Sec. 7401, 7474(c); the Safe Drinking Water Act, 100 Stat. 665, 42 U.S.C. Sec. 300j-11; and the Clean Water Act, 100 Stat. 77, 33 U.S.C. Sec. 1377.

The weakness of the petitioners' position becomes glaring when the member owned fee land circumstance is factored into the analysis. If Section 6 of the Allotment Act (25 U.S.C. Sec. 349) was still viable, it would follow that state jurisdiction would extend to tribal members on fee lands. The above-cited authorities demonstrate that the Allotment Act has no vitality or force to provide state

regulatory jurisdiction over tribal members on reservation fee lands. See *Moe, Mazurie,* and *DeCoteau v. District Court,* 420 U.S. 425 (1975). There is no satisfactory authority for the proposition that the Allotment Act has vitality to provide state jurisdiction to non-member fee land, and at the same time, has no continuing vitality to provide state jurisdiction to member-owned fee land. This Court, in *Garcia v. San Antonio Metro,* 469 U.S. 528 (1985), rejected as "unmanageable" judicial tests similar to those proposed by petitioners. The Court recognized that for it to require such tests would result in unauthorized judicial legislation.

Petitioners' reliance upon *Montana v. United States, supra,* is misplaced. Each of the petitioners and several amici cite and/or quote Footnote 9 found in *Montana* at 560, totally out of context. In the footnote, this Court was addressing the Ninth Circuit opinion (604 F.2d 1162) which had held the Crow Tribe could bar hunting and fishing by non-resident owners of fee land on the Crow Reservation. The Ninth Circuit had based its decision on this issue, in part, on the Allotment Acts. This Court rejected the Ninth Circuit holding as to this narrow question, stating that the Allotment Acts could not serve as support for the Ninth Circuit decision allowing the Crow Tribe to bar hunting and fishing by non-resident owners of fee land. The footnote language concerning congressional intent and belief as to the effect of the Allotment Acts must be viewed in this light. This footnote language in no way supports petitioners' argument that the Allotment Acts have a continuing vitality which divests the Yakima Nation of inherent authority to regulate land use and zoning of non-member owned fee lands.

The *Montana* decision itself negates the petitioners' arguments. This Court in *Montana* did not strike down all forms of tribal civil jurisdiction over non-members on fee lands. *Montana* recognized that a tribe has some forms of civil jurisdiction over non-members on fee lands in two broadly specified circumstances. The stated exceptions in *Montana* are not compatible with the argument that the Allotment Acts divest tribes of all inherent authority over non-members on fee land.

The inherent power of the Yakima Nation to regulate the land use and zoning of non-member owned fee land is not divested by the repudiated Allotment Acts. Instead, the determination of whether or not such inherent power can be exercised by the Yakima Nation depends on the test of *Mazurie/Wheeler*, or the above-mentioned *Montana* test and exceptions.

Finally, Public Law 280 (67 Stat. 588) cannot be construed as congressional legislation divesting the Yakima Nation of the power to zone non-member owned fee land. Only Petitioner Brendale argues that Pub. L. 280 constitutes a congressional sanction of the extension of state jurisdiction into Indian reservations. This Court in *California v. Cabazon Band of Mission Indians*, 94 L. Ed.2d, at 254, addressed the jurisdictional extent of Pub. L. 280:

> "In *Bryan v. Itasca County*, 426 U.S. 373 (1976) we interpreted Sec. 4 to grant state jurisdiction over private civil litigation involving reservation Indians in state court, but not to grant general regulatory authority. Id. at 385, 388-390. We held, therefore, that Minnesota could not apply its personal property tax within the reservation. Congress' primary concern in enacting Pub. L. 280 was combating lawlessness on reservations. Id. at 379-380. The Act plainly was not intended to effect total assimilation of Indian tribes into mainstream American society. Id. at 387. *We recognized that a grant to states of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values.*" (Emphasis supplied.)

It is clear that Pub. L. 280 is not the answer to petitioners' search for specific legislation divesting tribal authority.

IV. THE EXERCISE OF TRIBAL CIVIL REGULATORY POWER OVER NON-MEMBERS IS NOT AN UNCONSTITUTIONAL DELEGATION OF AUTHORITY.

Petitioners and their amici claim that the exercise of civil regulatory power by the Yakima Nation in the form of zoning non-member owned fee land is an unconstitutional delegation of authority by Congress. To support this contention, petitioners point to that inability of non-tribal members to vote for tribal leaders and participate in tribal government. This Court should continue its rejection of such argument.

Petitioners have failed to properly understand the *Treaty With the Yakimas*, 12 Stat. 951. As pointed out hereinabove, this *Treaty* is not a grant to the Yakimas by the United States. It is a grant from the Yakimas to the United States, the Yakimas retaining all powers not granted. *United States v. Winans, supra.* The *Treaty* reserved inherent sovereignty is, therefore, not a delegation by Congress of authority which is subject to constitutional scrutiny. This Court addressed this issue in *Talton v. Mayes*, 163 U.S. 376 (1896), wherein it reiterated the well settled principle that the Fifth Amendment to the Constitution of the United States is a limitation only upon the powers of the national government which the Constitution called into being. This Court then determined that the powers of self-government enjoyed by the Cherokee Nation existed prior to the Constitution and were not affected by the Fifth Amendment. *Talton v. Mayes*, at 384.

A similar question was addressed by this Court in *United States v. Mazurie, supra.* In that case, the non-

Indians had argued that because they could not participate in tribal government, the Wind River Tribes could not lawfully regulate their liquor sales on fee land within the reservation. Justice Rehnquist rejected this argument relying on *Williams v. Lee, supra,* and upon Article I, Section 8 of the Constitution which gives Congress power to regulate commerce with Indian tribes.

This same form of argument has been made in the cases challenging the lawful authority of Indian tribes to impose taxes on non-members. In *Morris v. Hitchcock,* 194 U.S. 384 (1904), this court considered a tax by the Chickasaw Nation on non-Indian for ownership of livestock within their reservation. The non-Indians had argued that the tribal tax violated the Fourth and Fifth Amendment to the Constitution. Id. at 385. This Court rejected the non-Indian arguments and sustained the validity of the tribal tax. Subsequently, in *Merrion v. Jicarilla Apache Tribe, supra,* this Court again upheld the validity of a tribal tax on non-members. Even though the tribal tax was not subject to scrutiny under the fourth and fifth amendments, this Court recognized a very real and practical limitation upon tribal authority stating:

> "Of course, the Tribe's authority to tax non-members is subject to constraints not imposed on other governmental entities; *the Federal Government can take away this power . . .*
> (Emphasis supplied).

Merrion at 141.

The exercise of land use and zoning authority by tribal government over non-member owned fee land is also subject to this ominous constraint. If tribal governments become over zealous or unfair and act in a manner which discriminates against non-members, Congress has the plenary authority to simply take this inherent power away. Such a constraint does temper tribal government

and the record before this Court in this case provides no indication of anything other than a good faith assertion of land use jurisdiction by the Yakima Nation. The constitutional arguments of the petitioners are invalid. Constraints exist which protect non-members from unfair treatment from tribal government should such a problem ever arise.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed, and the case remanded to the District Court as directed by the Ninth Circuit opinion. This Court should direct the District Court to enter an order which provides the Yakima Nation has exclusive authority to regulate the zoning of member owned fee land in the open area of the reservation. Finally, this Court should clarify *Montana v. United States, supra,* and should reaffirm the concept that Indian tribes possess those attributes of sovereignty not withdrawn by treaty, statute or by implication as a result of their dependent status.

Respectfully submitted,

TIM R. WEAVER
R. WAYNE BJUR

Dated: November 4, 1988

APPENDIX A
WAC 173-18-430 Yakima County. Streams

Stream Name	*Quadrangle Name and Size*	*Legal Description*
(1) Ahtanum Creek	Tampico 7 1/2 Wiley City 7 1/2 Yakima West 7 1/2 Yakima East 7 1/2	From confluence of North and South Forks of Ahtanum Creek (Sec.17, T12N,R16E) downstream to mouth at Yakima River (Sec.17,T12N, R19E) excluding those reaches within Yakima Indian Reservation.
(2) Ahtanum Creek (N.Fk.)	*Foundation Ridge* 7 1/2 Pine Mtn. 7 1/2 Tampico 7 1/2	From confluence of Ahtanum Creek North Fork and Ahtanum Creek Middle Fork (Sec. 24,T12N,R14E) downstream to mouth at Ahtanum Creek South Fork (Sec.17,T12N, R16E).
(3) Ahtanum Creek (S.Fk.)	*Pine Mtn.* 7 1/2 Tampico 7 1/2	From confluence of unnamed creek and Ahtanum Creek South Fork (Sec.24,T12N, R15E) downstream to mouth at Ahtanum Creek (left bank only).

Stream Name	*Quadrangle Name and Size*	*Legal Description*
(4) Columbia River*	*Priest Rapids* 15	From the Yakima Firing Center boundary (Sec. 3,T13N,R23E) downstream along the Grant-Yakima County line to Benton County line (Sec.12,T13N, R23E). The flow exceeds 200 cfs MAF at Yakima Firing Center boundary.
(5) Cowich Creek (S. Fork)	*Tieton* 7 1/2 Naches 7 1/2 Wiley City 7 1/2 Yakima 7 1/2 Selah West 7 1/2	From an approximate point (NW 1/4 of NE1/4 Sec. 33, T14N,R16E) downstream through Cowiche Creek to mouth at Naches River (Sec.9,T13N, R18E).
(6) Bumping River*	*Bumping Lake** 15 Old Scab Mtn. 7 1/2 Cliffdel 7 1/2	From U.S.G.S. gaging station (Sec.23,T16N, R12E) downstream to mouth at Naches and Little Naches rivers (Sec.4,T17N, R14E). Exclude federal lands. The flow is over 200 cfs MAF at U.S.G.S. gaging station.

Stream Name	*Quadrangle Name and Size*	*Legal Description*
(7) Little Naches River*	*Lester* 15 Easton* 15 Cliffdell 7 1/2	From confluence of North Fork and Middle Fork Little Naches River (Sec.36, T19N,R12E) downstream to mouth at Naches River (Sec.4,T17N,R14E) Exclude federal lands. The 200 cfs MAF point begins at confluence with Crow Creek (Sec.30,T18N,R14E).
(8) Naches River*	*Cliffdel* 7 1/2 Manastash Lake 7 1/2 Nile 7 1/2 Milk Canyon 7 1/2 Tieton 7 1/2 Naches 7 1/2 Selah 7 1/2	From confluence of Little Naches River and Bumping River (Sec.4,T17N,R14E) downstream to mouth at Yakima River (Sec.12,T13N,R18E). Exclude federal lands. The flow is 200cfs MAF at confluence of Little Naches River and Bumping River.
(9) Rattlesnake Creek*	*Meeks Table* 7 1/2 Nile 7 1/2	From Snoqualmie National Forest boundary (Sec.6, T15N,R15E) downstream to mouth at Naches River (Sec.3, same township). The flow at Snoqualmie N.F. boundary is 200 cfs MAF.

Stream Name	*Quadrangle Name and Size*	*Legal Description*
(10) Tieton River*	*Weddle Canyon* 7 1/2 Tieton* 7 1/2	From west section line (Sec.29,T14N, R15E) downstream to mouth at Naches River (Sec.35,T15N, R16E). Exclude federal lands. The flow is 200 cfs MAF at west section line (Sec.29,T14N, R15E).
(11) Tieton River (S. Fk.)	*White Pass* 15 Rimrock Lake 7 1/2	From the south section line (Sec.23, T12N,R12E) downstream to mouth at Rimrock Lake (Sec.7, T13N,R14E). Exclude federal lands.
(12) Yakima River (cont.)*	*Pomona* * 7 1/2 Selah 7 1/2 Yakima East 7 1/2 Wapato 7 1/2 Toppenish 7 1/2 Granger N.W. 7 1/2 Granger 7 1/2 Sunnyside 7 1/2 Mabton West 7 1/2 Mabton East 7 1/2 Prosser 7 1/2	From the Kittitas County line (Sec.33, T15N,R19E) downstream, excluding all federal lands and Yakima Indian Reservation, to Benton county line (Sec.7, T8N,R24E). The flow exceeds 200 cfs MAF at Kittitas County line.

[Order DE 76-14 § 173-18-430, filed 5/3/76; Order 73-14, § 173-18-430, filed 8/27/73; Order DE 72-13, § 173-18-430, filed 6/30/72.]